



SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION

5 Part 9302

RIN 3460-AA02

**Requests for Testimony or the Production of Records in a Court or other Proceedings in which the United States is not a Party**

**AGENCY:** Special Inspector General For Afghanistan Reconstruction.

**ACTION:** Interim final rule.

**SUMMARY:** This interim final rule establishes procedures for the public to obtain the production or disclosure of information and documents of Special Inspector General for Afghanistan Reconstruction (SIGAR) in connection with legal proceedings in which neither the United States nor the SIGAR is a party. It sets forth the procedures used when determining whether SIGAR employees will be permitted to testify or provide records relating to their official duties when they are subpoenaed or otherwise requested to testify. The rule also specifies the criteria that SIGAR officials are to use when deciding whether to allow an employee to testify or provide records.

**DATES:** This interim final rule is effective [Insert date of publication in the Federal Register]. Written comments may be submitted by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Submit written comments to Hugo Teufel, Acting General Counsel, e-mail: [hugo.teufel.civ@mail.mil](mailto:hugo.teufel.civ@mail.mil), Special Inspector General for Afghanistan Reconstruction, Arlington, Virginia.

**FOR FURTHER INFORMATION CONTACT:** Hugo Teufel, Acting General Counsel, at (703) 703-545-5990, e-mail: hugo.teufel.civ@mail.mil.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On January 28, 2008, the President signed into law the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. No. 110-181), which created the Special Inspector General for Afghanistan Reconstruction (SIGAR). Under 5 U.S.C. § 301, heads of Executive or military departments may prescribe regulations governing the conduct of its employees and the custody, use, and preservation of the department's records, papers, and property. Many departments and agencies have promulgated such regulations to provide procedures for the disclosure of official records and information.

Generally, these are termed *Touhy* regulations, after the Supreme Court's decision in *United States ex rel. Touhy v. Regan*, 340 U.S. 462 (1951). In that case, the Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following instructions of his or her supervisor regarding the disclosure that were issued pursuant to agency regulations. As such, an agency's *Touhy* regulations are the instructions agency employees are to follow when those employees receive requests or demands to testify or otherwise disclose agency records or information.

SIGAR's proposed *Touhy* regulations provide generally that employees of SIGAR may not disclose documents or information in response to a

demand or order of a court or any other authority without first being authorized by the agency to do so. The purpose of these regulations is to conserve valuable agency resources, protect SIGAR employees from becoming enmeshed in litigation, and to protect sensitive Government information and decision making processes within the confines of the law. In order to establish procedures to facilitate public interaction with SIGAR, SIGAR is issuing proposed and interim final regulations.

## **II. The Interim Final Rule**

This interim final rule establishes procedures governing the disclosure of information and records in connection with court litigation and certain other types of proceedings.

## **III. Procedural Requirements**

This interim final rule is generally similar to the *Touhy* procedures concerning the disclosure of information in litigation that have been adopted by other agencies. Further, this rule relates to agency management and personnel. Accordingly, SIGAR has determined that notice and public procedure thereon are impracticable, unnecessary and contrary to the public interest pursuant to 5 U.S.C. § 553(b)(3)(B). For the same reasons, SIGAR has determined that this interim rule should be issued without a delayed effective date pursuant to 5 U.S.C. § 553(d)(3). Nevertheless, SIGAR will consider any public comments on this interim final rule before issuing its final rule.

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply.

It has been determined that this rulemaking is not a significant regulatory action for the purposes of Executive Order 12866. Accordingly, a regulatory impact analysis is not required.

#### **List of Subjects in 5 CFR Part 9302**

Courts, Government employees, Freedom of information, Government employees.

#### **Authority and Issuance**

For the reasons set forth above, 5 CFR chapter LXXXIII is amended to add part 9302 to read as follows:

#### **PART 9302 -- Requests for Testimony or the Production of Records in a Court or other Proceedings in which the United States is not a Party**

**Authority:** Pub. L. No. 110-181 (Jan. 28, 2008), Section 1229 (122 Stat. 378-85), as amended, and Section 842 (122 Stat. 234-36), 10 U.S.C. 2302 note; and 5 U.S.C. 301.

§9302.1 SIGAR Touhy regulations.

(a) *Applicability.* (1) This section sets forth the policies and procedures of the Special Inspector General for Afghanistan Reconstruction (SIGAR or the agency) regarding the testimony of employees and former employees as witnesses and the production or disclosure of SIGAR documents or information for use in legal proceedings in which the United States is not a party and where the demand is pursuant to a sub-

poena, order or request (collectively referred to in this section as a "demand").

(2) This section does not apply to any legal proceeding in which an employee is to testify while on leave status regarding facts or events that are unrelated to the official business of SIGAR.

(3) (i) Nothing in this section affects the rights and procedures governing public access to agency records pursuant to the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act (5 U.S.C. 552a).

(ii) Demands in legal proceedings in which the United States is not a party for the production of SIGAR records or information, or for the testimony of SIGAR employees, regarding information or documents that are protected by the Privacy Act (5 U.S.C. 552a), the Trade Secrets Act (18 U.S.C. 1905) or other statutes, must satisfy the requirements for disclosure set forth in those statutes and the applicable regulations of this part, before the records may be provided or testimony given.

(4) This section is intended to provide guidance for the internal operations of SIGAR and to inform the public about SIGAR procedures concerning service of process upon SIGAR and its responses to demands. The procedures specified in this section, or the failure of any SIGAR employee to follow the procedures specified in this section, are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party against the United States.

(b) *Definitions.* For purposes of this section:

*Agency counsel* means: SIGAR's General Counsel or his or her designee.

*Demand* means a subpoena, order or request for testimony, documents or information related to, or for possible use in, a legal proceeding in which the United States is not a party.

*Document* means any record or other property, no matter what media, and including copies thereof, held by SIGAR, including without limitation, letters, Emails, telegrams, memoranda, facsimiles, reports, studies, calendar and diary entries, maps, graphs, pamphlets, notes, charts, tabulations, analyses, statistical or informational accumulations, summaries of meetings and conversations, film impressions, magnetic tapes and sound or mechanical reproductions.

*Employee* means all employees or officers of SIGAR, including (for the purpose of this section only) contractors and any other individuals who have been appointed by, or are subject to the supervision, jurisdiction or control of SIGAR. The procedures established within this subpart also apply to former employees of SIGAR where specifically stated in this section.

*General Counsel* means the General Counsel of SIGAR.

*Legal proceeding* means all pretrial, trial and post-trial stages of all judicial or administrative actions, hearings, investigations, arbitrations or similar proceedings before courts, commissions, boards, grand juries, or other tribunals, foreign or domestic. This term includes all phases of discovery as well as responses to informal requests by attorneys or others involved in legal proceedings seeking interviews or the like.

*Official business* means the authorized business of SIGAR as stated in the "National Defense Authorization Act for Fiscal Year 2008," Pub. L.

No. 110-181 (Jan. 28, 2008), Section 1229 (122 Stat. 378-85), as amended, and Section 842 (122 Stat. 234-36), 10 U.S.C. § 2302 note.

*Testimony* means an employee's statement in any form, including testifying before a court or other tribunal or board, giving depositions, interviews, telephonic, televised, videoconference or videotaped statements, and providing written responses to interrogatories, admission requests or other discovery.

(c) *SIGAR policy*. (1) SIGAR was established by Section 1229 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 (January 28, 2008), as a wartime or overseas contingency operation oversight agency of the United States Government's Executive Branch. SIGAR's Inspector General is appointed by the President of the United States. See Pub. L. No. 110-181, Section 1229(c). SIGAR performs oversight of Afghanistan reconstruction and security programs, operations and contracts to prevent and detect waste, fraud and abuse pursuant to Sections 1229 and 842 of Pub. L. No. 110-181. The records of an inspector general frequently contain sensitive law enforcement information that is protected from disclosure or obtained under guarantees of confidentiality.

(2) In appropriate cases, the agency counsel shall notify the United States Department of Justice (DOJ) of the demand and coordinate with the DOJ to file any appropriate motions or other pleadings.

(3) No current or former employee shall, in response to a demand, produce any SIGAR documents, provide testimony regarding any information relating to or based upon SIGAR documents, or disclose any information or produce materials acquired as part of the performance of that em-

ployee's official duties or official status, in a legal proceeding in which the United States is not a party, without the prior written authorization of the General Counsel. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); and 5 U.S.C. 301 ("The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.")

(d) *Procedures for demand for testimony or production of documents.*

(1) A written demand directed to SIGAR for the testimony of a SIGAR employee or for the production of documents shall be served in accordance with the requirements of the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, or applicable state procedures, as appropriate. If the demand is served by the U.S. mails, it should be addressed to the General Counsel, Special Inspector General for Afghanistan Reconstruction, 2530 Crystal Drive, Arlington VA 22202-3940. If the demand is served by overnight delivery service or courier, it should be directed to the General Counsel, Special Inspector General for Afghanistan Reconstruction, 2530 Crystal Drive, Arlington VA 22202-3940. SIGAR's acceptance of a demand shall not constitute an admission or waiver of any objection with respect to the propriety of jurisdiction, service of process, venue, or any other defense in law or equity available under applicable law.

(2) A subpoena or other demand for testimony directed to an employee or former employee shall be served in accordance with the Federal Rules of



Civil or Criminal Procedure or applicable State procedure; and a copy of the subpoena or demand shall be delivered to the General Counsel.

(3)(i) *Touhy* Request. In court cases in which the United States or SIGAR is not a party, where the giving of testimony or the production of documents by SIGAR, or a current or former employee is desired, a verified statement (declaration under penalty of perjury) by the litigant or his counsel, setting forth the information with respect to which the testimony or production is desired ("*Touhy* Request"), must be submitted in order to obtain a decision concerning whether such testimony or production will be authorized by SIGAR. The *Touhy* Request should include: the title of the legal proceeding, the court or other forum, the requesting party's interest in the legal proceeding, a statement whether other evidence reasonably suited to the requester's needs is not otherwise available, and, if testimony is requested, the subject matter and intended use of the testimony, a statement whether document(s) could be provided in lieu of testimony to satisfy the request, and a statement that the requester will submit a check for costs of duplication at commercially reasonable rates to SIGAR if the request is granted. The purpose of these requirements is to assist the General Counsel in making a fair and informed decision under governing law regarding whether testimony or the production of document should be authorized and under what conditions, if any. Permission to testify or produce documents will be limited to the areas of proposed testimony described in the *Touhy* Request.

(ii) Agency counsel may consult or negotiate with an attorney for a party or the party, if not represented by an attorney, to refine or limit a demand so that compliance is less burdensome or to obtain in-

formation necessary to make the determination required by paragraph (e) of this section. Failure of the requester to cooperate in good faith to enable the General Counsel to make an informed determination under this subpart may serve as a basis for denying the *Touhy* Request.

(iii) A determination under this section to comply or not to comply with the *Touhy* Request is without prejudice to the agency's assertion of privilege, lack of relevance, technical deficiency, or any other objection to the demand.

(4)(i) Employees shall immediately refer all inquiries and demands made to SIGAR or its employees to the General Counsel.

(ii) An employee who receives a demand shall forward the demand to the General Counsel, who will determine the agency's response to the demand under this section.

(e) *Factors to be considered by the General Counsel with respect to a Touhy Request.* (1) In deciding whether to authorize the release of official information or the testimony of SIGAR personnel concerning official information (hereafter referred to as the "disclosure"), the General Counsel shall consider the following factors:

(i) Whether the demand is unduly burdensome to the agency or otherwise inappropriate under the applicable rules of discovery, evidence and procedure governing the litigation in which the demand arose, balanced against the need for the specific testimony or documents sought;

(ii) Whether the demand is appropriate under the relevant substantive law of privilege and disclosure of Government information, or seeks information or documents protected from disclosure under the Freedom of

Information Act, 5 U.S.C. 552(b), the Privacy Act, 5 U.S.C. 552a, or the Inspector General Act of 1978, as amended, 5 U.S.C. App.;

(iii) Whether the demand would interfere with SIGAR's statutory mandate stated in the "National Defense Authorization Act for Fiscal Year 2008," Pub. L. No. 110-181 (Jan. 28, 2008), Section 1229 (122 Stat. 378-85), as amended; Pub. L. No. 110-181, Section 842 (122 Stat. 234-36), 10 U.S.C. 2302 note; or the Inspector General Act of 1978, as amended, 5 U.S.C. App.;

(iv) Whether the demand would be in the public interest;

(v) The extent to which the time of employees for conducting official agency business would be compromised;

(vi) Whether the request demonstrates that the information requested is relevant and material to the action pending, genuinely necessary to the proceeding, unavailable from other sources, and reasonable in scope; and

(vii) Whether other similar requests are likely to have a deleterious cumulative effect on the expenditure of agency time and resources.

(2) Among those demands and requests in response to which compliance will ordinarily not be authorized are those with respect to which any of the following factors exists:

(i) The requested disclosure elicits information or documents protected by a statute, Executive Order or regulation, including but not limited to Section 7(b) of the Inspector General Act of 1978, as amended, 5 U.S.C. App. 3, section 7(b), or other prohibition from disclosure;

(ii) The requested disclosure would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source, confidential informant or undercover agent, or disclose trade secrets or similar confidential commercial or financial information.

(iii) The integrity of the administrative and deliberative processes of SIGAR would be jeopardized;

(iv) The requested disclosure would not be appropriate under the rules of procedure governing the pending litigation or matter in which the demand arose;

(v) The requested disclosure is not appropriate under the relevant substantive law concerning privilege; or

(vi) The requested disclosure, except when production is in camera, would reveal information properly classified or other matters exempt from unrestricted disclosure.

(3) All decisions granting or denying a *Touhy* Request must be in writing and, if a denial, provide the grounds for the decision in summary form based on one or more of the factors listed above.

(f) *Requests for opinion or expert testimony.* (1) Pursuant to 5 CFR 2635.805, an employee shall not provide, with or without compensation, opinion or expert testimony in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest, except on behalf of the United States or a party represented by the Department of Justice, without written approval of agency counsel.

(2) Upon a showing by the requestor of exceptional need or unique circumstances, the General Counsel may, in writing, grant authorization for an employee, or former employee, to appear and testify.

(3) Any expert or opinion testimony by a former employee of SIGAR shall be excepted from the restriction under 5 CFR 2635.805 where the testimony involves only general expertise gained while employed at SIGAR.

(g) *Procedures when agency counsel directs an employee not to testify or provide documents.* (1) If agency counsel determines that an employee or former employee should not comply with a subpoena or other request for testimony or the production of documents, agency counsel will so inform the employee and the requesting party who submitted the demand.

(2) If, despite the determination of the agency counsel that testimony should not be given or documents not be produced, a court of competent jurisdiction or other tribunal orders the employee or former employee to testify and/or produce documents, the employee shall promptly notify the General Counsel of such Order.

(i) If agency counsel determines that no further legal review of, appeal from, or challenge to, the Order will be sought, agency counsel shall promptly inform the employee or former employee of said determination.

(ii) If SIGAR determines to challenge an Order directing testimony or the production of documents in litigation in which the United States is not a party, the employee should not comply with the Order. The em-

ployee should appear at the time and place as commanded in the order or subpoena. If legal counsel cannot appear on behalf of the employee, the employee should produce a copy of this section and respectfully inform the Court or other legal tribunal that he/she has been advised by the General Counsel not to provide the requested testimony or documents pursuant to the decision of the United States Supreme Court in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), and this section. Agency counsel will coordinate with the DOJ to file such motions or other pleadings that may be deemed appropriate in the circumstances, such as, for example, a notice to remove the case from state court to federal court, or a motion to quash or modify the subpoena, or a motion for a protective order.

(h) *Fees*. In the event that a Touhy Request is granted, SIGAR may charge reasonable fees to parties seeking official information or records. Such fees are calculated to reimburse the Government for the expense of providing such information or records, and may include the costs of time expended by SIGAR employees to process and respond to the request; attorney time for reviewing the request and any responsive records and for related legal work in connection with the request; and reasonable expenses generated by materials and equipment used to search for, produce, and copy the responsive information or records.

Dated: March 12, 2012.

Steven J Trent,

Acting Inspector General, Special Inspector General for Afghanistan Reconstruction.

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